2013

Enforcement Manual

Investigation of incidents

THE RMA QUALITY PLANNING RESOURCE

Investigation of incidents

This guidance note is the first of seven guidance notes relating to enforcement and compliance under the Resource Management Act 1991 (RMA). The note covers matters related to the investigation of incidents, specifically:

Guidance note

To access the guidance note scroll down or click the link above.

The Legal Context for Evidence

Introduction

An investigation of an incident under the RMA is a systematic inquiry undertaken in order to establish verifiable facts. In relation to an offence, the aim is to determine what happened (including the causes and effects of the incident involved), who did what, and why.

Many factors may be involved in an offence, especially in terms of the causes of the act or omission in issue. None of these factors should be ignored in an investigation. It is important that incidents are investigated thoroughly and the correct procedures are followed. If mistakes are made, or the correct procedures are not followed, the subsequent enforcement action may fail. For example, the evidence gathered during the investigation may be excluded from consideration by the Court.

The objectives of a good investigation include the following:

1. assurance that an offence has or has not occurred (i.e. all tenable theories have been investigated and assessed, and all reasonable inquiries undertaken)
2. disclosing a persuasive case for a guilty plea (i.e. avoiding the unnecessary costs of a defended hearing)
3. making good decisions to prosecute or otherwise
4. efficiency: do it once, do it properly.

The Evidence Act 2006 (EA) has become the starting point for determining the admissibility of evidence. The existing common law remains applicable, but only to the extent that it is consistent with EA's provisions, including its purpose and principles (refer 10(1) of the EA). The common law will continue to be of importance in a number of areas, for example in assessing whether evidence has been fairly and properly obtained.

Proof and evidence

Offences under the RMA can result in criminal proceedings (i.e. prosecution). The relevant Court determines the facts based on the evidence before it, and also whether those facts justify the legal action taken or sought. The hearing may be before a judge alone, or a jury depending on the offence involved.

The prosecuting authority has to prove that the defendant committed the offence, which is commonly referred to the 'burden of proof ' principle. If there is reasonable doubt as to whether the evidence proves that the defendant committed the offence, the 'burden of proof 'has not been met and the defendant will be acquitted.

Generally, the prosecuting authority must also prove that any defences raised by the defendant do not apply. However, in some cases the statute which prescribes the offence shifts the burden of providing that a defence applies onto the defendant. For example, defences under the RMA and Building Act 2004 may be upheld if the defendant proves the stated elements (s341 of the RMA, s388 of the Building Act 2004).

The Elements of an Offence

In order to establish that an offence has been committed, it is important to understand exactly what must be proved. The usual starting point is to look at how the offence is defined in the RMA, and determine each part of the definition that must be proved. This approach is commonly referred to as **elements** or **ingredients of the offence**.

For example, s338 of the RMA states:

(3) Every person commits an offence against this Act who -

(a) Wilfully obstructs, hinders, resists, or deceives any person in the execution of any powers conferred on that person by or under this Act:

The elements of this offence are:

- a person
- wilfully
- obstructs, hinders, resists, or deceives any person
- in the execution of any powers conferred on that person by or under the RMA.

Knowing the elements of an offence helps direct inquiries toward the issues that will be most relevant. This will ensure proof is appropriately aligned with what is required for prosecutions or the issuing of infringement notices. Relating the evidence you collect to the elements of the offence is known as 'fact analysis'.

Fact analysis

Fact analysis is a technique that helps investigating officers and lawyers understand the evidence they require to prove an offence. Fact analysis helps:

1. understand all the elements that need to be proven and avoid possible failure of proceedings from lack of evidence
2. plan and track investigation progress: the material facts for which there is evidence, and what gaps remain.

Initially, fact analysis may consist of a mental check of aspects related to compliance when an officer first arrives on the scene of an incident. Done correctly it can enable the officer to quickly identify the type of evidence detectable at the scene, and identify any gaps in the evidence that will need to be filled later on.

Fact analysis skills are important for all compliance officers, whether Police, Department of Labour inspectors, or council staff. The skills need to be used consistently and are particularly crucial when determining whether to prosecute or issue an infringement notice on the spot.

Carrying out fact analysis and identifying evidence

Before arriving at the scene of a potential offence, officers will have framed some initial thoughts, or a tentative theory, as to what may have occurred. From these thoughts or theories the officer may then decide which (if any) offence best fits the case. The next step is to test for proof of the offence. The following method could be used:

1: Identifying elements of the offence

- Write out the full description of the offence, including the relevant provision in s338 of the RMA, along with any related national environmental standard, plan rule, resource consent condition, abatement notice, or enforcement order that has been breached.
- Separate out each element of the offence. An element is any part of the offence description that requires its own evidence. Avoid any assumption that proof of one element is automatically proof of another, by breaking the elements down to their smallest factual units. Omitting proof of any element may result in failure. For example, "girth of tree measured at 1.4 metres above ground level" contains at least three factual elements:
    - girth of the tree
    - establishment of ground level
    - measurement at 1.4 metres.

Each of these elements must be separately confirmed.

- If there are any exceptions set out in the RMA provision which establishes the offence (or the related national environmental standard, plan rule, resource consent condition, abatement notice, or enforcement order) be careful to consider and record whether each of them applies.
- Consider any statutory defences and test whether any will be applicable. Check and record whether a resource consent or use rights exist that cover the apparent breach.
- It is usual for an 'information' (the charges laid to commence summary proceedings) to contain the date and place the alleged offence took place, so these should be recorded even if they are not an element of the offence. The date is also relevant to the timing for laying the charges given the six-month deadline under s338(4) of the RMA.

2: Identifying the material facts

- Ask "which verifiable facts would prove each element of the offence?"
- Write those facts alongside each related element.

Defences under the RMA can also be said to have elements. Knowing these defences can avoid wasting precious time. When interviewing the alleged offender, having this background knowledge will allow you to focus in on the relevant parts of their explanation.

- Consider which verifiable facts would demonstrate a possible statutory defence in relation to the offence.

3: Identifying relevant evidence

The primary principle for determining whether evidence is admissible is its relevance: evidence must tend to prove or disprove an important matter for determination in the proceedings. If the evidence you propose to submit to Court directly establishes a material fact, it is likely to be relevant.

Evidence may also be admissible if, together with other evidence, it creates an inference of a material fact. An example of evidence requiring an inference to be drawn would be the equipment found lying by a destroyed tree (protected under a district plan) soon after it was removed, with sawdust in its cutting mechanism. An inference about who destroyed the tree might be supported by other evidence as to ownership of that equipment.

The good practice examples section of this guidance note provides an example of a short form table for fact analysis.

Evidence: an Introduction

Evidence is the usual means of proving or disproving a fact, or matter at issue.

The most common method of giving evidence in a court situation is by oral testimony under oath or affirmation. Oral testimony is often supported by 'producing exhibits ', which means depositing physical or documentary evidence with the Court. Note that 'document' in the (EA) includes any material from which symbols, images or sounds can be derived, as well as information electronically recorded and stored. Oral testimony establishes the relevance and accuracy of the exhibit.

It may be helpful to think of evidence in three categories:

1. Evidence about the identity of the offender. If your case fails, it is likely to be on these grounds. You can see what was done, but you cannot prove who did it, or permitted it, or which person is culpable as a principal under s340 of the RMA.
2. Evidence about the act or action itself. Occasionally this is an issue, especially on technical or subjective matters.
3. Evidence about intent to commit the act or action (this is not required in 'strict liability' offences).

The fundamental principle: relevance

All relevant evidence is admissible, unless there is some policy reason to exclude it (refer s7 of the EA). The policy reasons can be summarised by reference to s6 of the EA. The admission of evidence should:

- recognise the importance of the rights affirmed by the New Zealand Bill of Rights Act 1990
- promote fairness to parties and witnesses
- protect rights of confidentiality and other important public interests
- avoid unjustifiable expense and delay.

As explained above, relevant evidence is evidence that tends to prove or disprove an element of an offence. The extent of this tendency is known as the probative value of the evidence. The probative value of evidence must outweigh any risk that it will have an unfairly prejudicial effect on the proceeding - or needlessly prolong it (refer s8(1) of the EA).

Obligation of fairness

Every act by a public authority which is carried out under a legislative power is governed by the principles of 'natural justice'. This means that the process or approach must be fair. There is no statutory formula for fairness, but relevant matters in an investigation would include:

- keeping an open mind during inquiries
- not targeting a particular defendant unless evidence supports that
- being fair in dealings with a defendant.

The obligation continues past the laying of charges to disclosure of the prosecution case (which should be full and timely).

The attitude of the investigator is important. The investigator is an employee of an authority, but more importantly an officer of the public system of justice which has the interests of the community at its heart. It is not the role of an investigator to get convictions for offences, but to establish what actually happened; and if charges are laid, to assist the court in making a correct decision. Intuition may assist in developing lines of inquiry, but personal beliefs should not close off alternative lines too early.

Improperly obtained evidence

The obligation to be fair in relation to the collection of evidence, is now legislated in s30 of the EA. A judge may exclude evidence obtained improperly or unfairly (refer s30(5)of the EA).

The judge must make a decision about whether to exclude evidence if a defendant or the judge raises the issue of it being improperly obtained. The decision is made by weighing the impropriety against the "need for an effective and credible system of justice." In particular the judge may have regard to the matters set out in s30(3)(a)-(h) of the EA:

a. the importance of any right breached by the impropriety and the seriousness of the intrusion on it
b. the nature of the impropriety, in particular, whether it was deliberate, reckless, or done in bad faith
c. the nature and quality of the improperly obtained evidence:
d. the seriousness of the offence with which the defendant is charged
e. whether there were any other investigatory techniques not involving any breach of the rights that were known to be available but were not used
f. whether there are alternative remedies to exclusion of the evidence which can adequately provide redress to the defendant
g. whether the impropriety was necessary to avoid apprehended physical danger to the police or others
h. whether there was any urgency in obtaining the improperly obtained evidence

Section 30 of the EA should remind investigators that they need to consider the different lines of inquiry available, if a potential offender's rights and freedoms may be restricted by the approach taken. An example is the choice to use search warrants before attempting to interview suspects and determine their willingness to provide information, when urgent action is not critical to securing evidence which may be at the site.

Powers of Investigation

The extent of an investigator's authority

Generally, an investigator has the authority to investigate incidents within the scope of duties and responsibilities laid down by the authority's empowering legislation. For example, investigators employed by a district council should not use their powers to obtain evidence for offences outside the jurisdiction of the district council.

An investigator has no more rights than the ordinary person in obtaining evidence, except if given specific powers to do so. An example of this is entry to private land.

Enforcement officer authorisation and warrants

Before a person can carry out all or any of the functions and powers of an enforcement officer under the RMA, that person must be specifically authorised by a local authority under s38 of the RMA.

Once authorised, enforcement officers are provided with a warrant which sets out the functions and powers the particular person has been given. The holder is obliged to carry the warrant when exercising any function or power, and to produce it together with evidence of identity (usually incorporated into the warrant card by way of photograph) if required to do so. An example is the requirement to produce the warrant when exercising the power to enter private land under s332 of the RMA.

The types of people a local authority may authorise to be an enforcement officer are:

- any of its officers
- officers of another local authority, or of the Department of Conservation, or of Maritime New Zealand, subject to terms of appointment agreed between the authorities.
- a security guard or employee of a security guard who meets the requirements of s38(2) of the RMA, but only in regard to s327 and s328 powers, which relate to excessive noise

Expiry of warrants

On termination of appointment, enforcement officers must surrender their warrant to the local authority.

Some local authorities issue warrant cards with an expiry date to avoid the unintended continuation of warrants after employees leave. However, this is not recommended as it requires procedures to be in place for ensuring that warrant cards are current. It is easier to bundle the surrender of warrants together with any other requirements (e.g., surrender of field equipment) relating to the termination of the employment period.

Powers of entry

Privacy

The starting point for all powers of entry, inspection and search is the common law right to privacy. The law protects privacy. As an employee of a prosecuting authority, an enforcement officer has no greater right than a person off the street to invade privacy, unless an additional power is given to the officer by statute.

Ordinarily then, a person needs consent to enter private land or premises. Like any other person, enforcement officers can go to the front door of a property (or other public or customer entrance), and make reasonable inquiries to locate the owner or occupier; but if no one is home or if turned away, they must leave. The exception to this is where the owner or occupier of a site has made it clear that members of the public cannot enter, by way of signage or otherwise.

To be fair in carrying out an investigation, enforcement officers should explain who they are and the purpose of the visit so the occupier has opportunity to ask them to leave.

Common issues

Questions commonly asked by enforcement officers about inspections include:

- When must they rely upon their power of entry and, therefore, also show their warrant or leave a notice of inspection when they exercise the power?
- What assistance and force can be applied during an inspection?
- How they can use search warrants?

General power of local authority to enter land

Section 171 of the Local Government Act 2002 (LGA) provides a general power for a local authority to enter private land (though not a dwelling) to enable the local authority to perform its functions under the LGA. This is a general power available for all council inspections, but it need only be relied on when no other provision assists.

If entry is to determine compliance with a national environment standard, district or regional plan, resource consent, or abatement notice (among others), s332 of the RMA provides a power of entry without prior notice. However, officers are still required to show their warrant on arrival, and to leave a notice of inspection if no one is home. Entry can only occur during reasonable times.

The power does not extend to a 'dwellinghouse', which is defined to mean any building used as a residence, along with any structure or outdoor area. To enter a dwellinghouse, an enforcement officer will require a search warrant. In such circumstances the general power under the LGA provides no advantage.

If there is an emergency situation under s330 of the RMA, s330(2) provides a power to the local authority to enter private land (including a dwelling house) and do works, or direct the occupier to do works, to remove the cause or mitigate the effects of the emergency. Although they have some emergency powers under the RMA, the express

power to enter private land does not extend to owners and operators of public works, network utilities, and lifeline utilities. A separate guidance note on emergency powers provides further information.

Power to inspect to determine compliance - s332 of the RMA

Under s332 of the RMA, any enforcement officer, specifically authorised in writing by any local authority to do so, may at all reasonable times go on, into, under or over any place or structure, including private property except a dwelling house, for the purpose of inspection to determine whether the RMA, an enforcement order, or an abatement notice, etc., is being complied with.

It is important for the officer's warrant under s38 of the RMA to clearly state that the enforcement officer is authorised to act pursuant to s332.

Note that compliance with the RMA includes compliance with the general duties in s16 to avoid unreasonable noise and s17 to avoid, remedy or mitigate adverse effects, regardless of whether a consent, rule or national environmental standard applies.

Further inspections

The power under s332 of the RMA is to enter to determine compliance. Arguably this power is 'exhausted' once an investigator has sufficient evidence to be reasonably satisfied of non-compliance by a person.

Samples may be taken to determine whether or not there is any non-compliance, but once this is clear the power of inspection cannot be relied on to gather further evidence.

For example, the High Court in Waikato Regional Council v Wellington City Council [2003] NZRMA 481 (HC Auckland AP18-SWO3) stated that if a local authority has made up its mind to prosecute, and the purpose is to gather further evidence for prosecution of an imprisonable offence, s332 cannot be relied upon and a search warrant is required (unless there is permission to enter).

Time of entry

Section 332(1) of the RMA provides that entry is to be at all reasonable times (e.g., not late at night), unless there is justification.

Taking samples

Section 332(2) of the RMA provides that the enforcement officer may take samples of water, air, soil or organic matter. Under s332(2A) the officer may also take a sample of any substance for which there is reasonable cause to be suspected of being a contaminant of any water, air, soil or organic matter.

Samples do not include documents. To take anything belonging to a person and not specifically authorised to be taken by inspection powers would amount to criminal conversion or theft.

Assistance

Section 332(6) of the RMA provides that any enforcement officer exercising any power under s332 may use such assistance as is 'reasonably necessary'.

This provision was considered in An Application by Waikato Regional Council [2002] A226/02, where the Court was asked to make a declaration on the assistance that enforcement officers can call on. The Court considered the ordinary meanings of the words in S332 (6) and the definition of 'reasonably necessary'.

The Court found that an enforcement officer may, when it is reasonably necessary, seek assistance from non-warranted officers of the council or experts, police officers, vehicles and specialised equipment (and specialised or licensed operators) needed for the inspection and taking of samples. A local authority might also use reasonable force to assist entry. An example of this might include the breaking of locks when the occupier was given a fair opportunity but refused to open them with a key, and the opening of the locks was necessary for the purposes of the inspection. However, given the different situations that could arise, the Court declined to make a declaration in the terms sought.

The Council appealed to the High Court. The High Court in Waikato Regional Council v Wellington City Council [2003] NZRMA 481 (HC Auckland AP18-SWO3) also refused to make the declaration sought and remitted the case back to the Environment Court.

Requirements of entry under s322 of the RMA

1: Production of warrant

The first step the enforcement officer must take upon entering a property is to make an attempt to find the owner or occupier. If the owner or occupier is present, the enforcement officer must produce the warrant. If the owner/occupier later asks to see the warrant again, the warrant must be shown.

If more than one enforcement officer is involved in the inspection, all of them must provide their warrants. It is not sufficient for only one of the enforcement officers to do so.

If the enforcement officer suspects the person at the property is not the owner or occupier (refer s2 of the RMA), the warrant should still be produced.

Enforcement officers should produce their warrants whenever private property is entered. This will avoid any argument later that the evidence was collected unlawfully and is inadmissible.

2: Notice of inspection

If the owner/occupier is not present, a written notice showing the date and time of the inspection and the name of each enforcement officer who inspected should be left in a prominent position, or attached to the structure inspected. A photograph of the notice should be taken as evidence of compliance with s332(4) of the RMA and, a letter should also be sent to the owner/occupier notifying them of the visit.

If the owner/occupier is not present, s332(4) should always be complied with to avoid any argument that the evidence collected is inadmissible.

Obstruction

If the owner/occupier is obstructive, the enforcement officer should leave the property and arrange for a police officer to accompany him or her back onto the property later.

Wilful obstruction of any person executing any powers conferred by the RMA is an offence against s338(3). The maximum penalty is $1,500.

Powers of search

Search warrants - s334 and s335 of the RMA

Under s334, an application for a warrant for entry to search can be made where there are reasonable grounds for believing an offence has been committed that is punishable by imprisonment. In particular, warrants can be obtained to search for specified things where there are reasonable grounds to believe that they:

- are on or in any place or vehicle, and
- will provide evidence of the offence or are intended for the purpose of committing the offence.

As indicated by the wording of the second item above, a search warrant can be pre-emptive.

The power to seize applies not only to what is specified in a warrant, but also to any other thing for which the enforcement officer or constable reasonably believes a warrant could have been obtained for.

Note that some RMA offences are not imprisonable, such as noise notices under s327 and s322(1)(c).

Section 335 provides that the warrant must be executed by either a constable or an enforcement officer accompanied by a constable. There are various requirements under s335(4) to show the warrant, to leave written notice of the search if the owner/occupier is not present at the time, and to send a list of taken items to the owner or occupier.

Illegal and unreasonable searches

If a search breaks any law or breaches the legal rights of any person (such as failing to provide proper notice), a judge may exclude, from consideration, the evidence that was obtained. Section 30 of the EA applies in such circumstances. The judge will consider things such as, "whether there were any other investigatory techniques not involving any breach of the rights that were known to be available but were not used".

A search may also be unreasonable or 'unfair' even if legal. An example is when there was no good reason to enter, or to enter with force, after permission was refused. Section 21 of the New Zealand Bill of Rights Act requires that any search or seizure

undertaken in the exercise of a public function must be reasonable. Proceedings in relation to s21 of the Bill of Rights Act may also result in monetary damages or compensation being awarded.

Previous cases are still relevant to the extent that they are consistent with the provisions and purposes of the EA .

In *Hamed* v R [2011] NZSC 101 the Supreme Court held that video surveillance could constitute a search if the subject matter of the surveillance was not a place that was within public view.

In considering whether a search is unreasonable the Supreme Court held that it is necessary to look at the nature of the place or object being searched, the degree of intrusiveness into privacy and the reason why the search was occurring.

Power to require certain information - s22 of the RMA

The RMA gives enforcement officers the power to require a suspect to provide information as to their identity.

Under s22 of the RMA, if the officer has reasonable grounds to believe that a person is breaching or has breached any obligations under this part, the officer can direct him or her to give the officer the following information:

- if the person is a natural person, their full name, address and date of birth
- if not, the person's full name and address only.

The officer can also direct the person to give the following information about another person on whose behalf they are breaching or have breached any obligations under Part 3 of the RMA:

- if the other person is a natural person, their full name, address and date of birth
- if not, its full name and address only.

It is an offence not to provide this information (s338(2) of the RMA).

Investigation Procedures

Should the incident be investigated?

The first question for a local authority when it becomes aware of an incident taking, or having taken, place, is whether it should apply its resources to investigating the matter.

A local authority may want to screen any incidents it has become aware of against a set of priorities for the inspection of incidents. This may result in some matters getting more urgent attention.

Usually a decision about whether to pursue an investigation cannot be made until after the first inspection. That inspection should determine whether a contravention within the local authority's jurisdiction is likely to have taken place.

If the local authority has jurisdiction, it may then want to consider the challenges likely to be raised by detecting the offender, proving the non-complying act or omission, and dealing with any environmental effects - as well as the relative significance of the matter. This will help the local authority program its response efficiently as amongst all the cases that demand its attention.

Each incident will be different and decisions will need to be made on a case-by-case basis.

Planning the investigation

During the investigation, it is often helpful to plan both generally, and for particular inspections and interviews. Planning becomes even more important for more complex cases, where a range of possibilities present themselves. The kinds of questions enforcement officers may ask themselves include:

- What do we believe happened? Who did it and why? What are the most likely alternatives to our current beliefs?
- Which avenues of inquiry are likely to be most productive? What capabilities and specialised skills do we have, or need to obtain, in order to gather and process evidence? How can we use these to set priorities?
- If we are having difficulties proving the offence occurred, or have doubts about our theory of the case, is there something we have overlooked that indicates there could be another party, another motive, or another past activity relevant to the offending?
- What were the relationships involved in the offending? Who committed, permitted, assisted, or was a principal? Who was likely to have been in the same place at the same time? Who advises the suspects, keeps their records? What other parties may have unwittingly handled or cross-contaminated evidence before the investigation began?

Teamwork is an important part of complex investigations. If the case is proving challenging, consider asking for partners in solving it: help could come from another compliance person or, if you are sole-charge, a planner or team leader who has an interest.

All the tools of group-thinking and problem solving can be drawn on. At the simplest level you might brainstorm and white-board your leads and ask what more you can do with them. A good resource is the MindTools website.

Inspections

This section focuses on procedures related to inspection. Some topics, for example note-taking, may also apply more generally to evidence collection.

Preparation

Preliminary research can help you get the most out of your site visit. Inquiries might include:

- applicable rules for the site including zoning, scheduled items, and other site features, characteristics or limitations
- building plans if the matter relates to built work, so a general comparison can be made on-site between what has been built and what has been approved
- any resource consents and their conditions
- compliance history on file for the site
- aerial photos
- possible witnesses
- collecting any information that may assist in the preparation of a scene diagram.

Investigation and collecting evidence onsite

Once on-site, an enforcement officer may collate information and evidence through a variety of means including:

- preparing a scene diagram
- sampling
- note taking
- photographs.

Checklists can be useful in guiding the investigation and collecting evidence. They can serve as prompts to guide procedures and remind officers of:

- other possible lines of inquiry or investigation methods
- witnesses who may need to be interviewed
- evidence which may need to be photographed.

Scene diagrams

A scene diagram is a way of illustrating the evidence you are giving in court. Its accuracy might be challenged, so prepare a drawing at the scene first. This will give you confidence about the details and help refresh your memory if necessary.

While the diagram should be kept simple, it might include the following features:

- an indicator for north

- key buildings and boundaries
- the location of the offending or causative actions/omissions
- locations and numbers of any samples collected
- reference points to accurately place any photograph taken or a more detailed diagram made at the scene
- the area where any effects occurred and arrows showing any movements of those effects
- the location of, and identifiers for affected people, animals and objects within the effects areas
- incident factors including contributors such as wind direction for spray drift; and impeders such as natural or artificial shelter belts for spray drift.

An effective method is to use acetate sheets for investigations where features of the land or land use are important. Overlay these on land-base maps of the area, which may incorporate, for example, roads and infrastructure, topography, aerial photographs, property boundaries, or zoning. If relevant your sketch should include any variations to the underlying land-base information.

Finalising a scene diagram on a computer produces the best result. A few arrows and labels pointing to key features can be helpful.

Sampling

Measurements can sometimes be material facts in an offence. Sometimes the measurements that need to be taken do not relate to a specific object or location. What needs to be determined is the effects of an activity on a wider area or population. If so, then choices must be made about what is sampled for measurement, to provide an indication of the big picture. For economic and practical reasons, the number of samples must be limited, but the investigating officer must ensure that they are as representative as possible.

For example, random sampling either across a broad population or within target strata (categories or groupings) is generally the most representative method. In some cases, randomness can be approximated by walk-through sampling of an affected area, so long as a large number of locations are used. Be mindful that certain features of an area that are likely to capture attention may bias the sample.

Where measurements relate to a discharge, it may be important to determine the path of the contaminant and restrict your sample to it. This approach will provide a more accurate picture of the damage done. One way of determining the path is to work backwards from the location of the complaint to the site of discharge, taking into account the mechanics or methods of discharge and any external factors such as wind direction.

You should adapt sample collection to the type of material being sampled. The method should be scientifically acceptable. For example:

- Vegetation and water samples provide the best indication of spray drift.
- Any soil samples should be taken from exposed areas, scraped from the surface only.
- Hard-surface samples of contaminants can be collected by wiping the surface with a clean tissue and placing the tissue in a clean press-seal bag. An unused tissue from

the same batch should be submitted in a separate sample bag for comparison (the 'control ').

All other possible causes must be considered and excluded. For example:

- Plant damage, human health and animal symptoms may not have been caused by an agrichemical, but by stress, disease or other factors.
- Even where a herbicide is the cause, other applications nearby, even some weeks beforehand, could have caused the damage. Volatile agrichemicals are capable of travelling kilometres off target, so consider interviewing neighbours.
- There may be more than one point of discharge, each with its own operator and particular factors. Samples should be collected from these other sources to establish their effect on the receiving environment.
- The fact that a discharge pipe is located on a particular property does not necessarily mean the occupier of that property is causing the offence.

Use laboratories with registered quality assurance procedures. Make sure that the laboratory completes a chain of custody (PDF, 14 KB) form to ensure the sample is not confused with another sample and is kept secure, so there is no possibility of the sample being tampered with or cross-contaminated.

Technical instruments

Enforcement officers are likely to use a variety of technical instruments in collecting samples and in carrying out field measurements. The admissibility of data generated by mechanical or computerised instruments is subject to the EA. To be able to admit evidence collected by the use of an instrument it is necessary to show the following:

- The instrument was used by someone qualified to use it.
- There was correct operation of the instrument, and it was in good condition for accurate work. It may be necessary to produce the manufacturer's specifications for the instrument and give evidence that the instrument was regularly maintained and/or calibrated in accordance with the manufacturer’s specifications or standard analytical methods or procedures.
- If the instrument is complex and not in common daily usage, evidence must show that the instrument was constructed and/or programmed on scientific principles, and is accepted as dependable for its purpose by the profession concerned in that branch of science or its related field. This sort of evidence can only be given by an expert.

Time

Some types of samples need to be dealt with quickly to avoid degradation and maintain their evidential integrity. Some samples may need to be frozen or stored in airtight containers until decisions are made as to whether, for example, the sample should be sent to a laboratory for analysis.

Sampling may need to be repeated to take account of any lag in time until the full extent of damage occurs.

Witness evidence should be taken as soon as possible after an incident, so the events are fresh in the person's mind. Recorded statements will assist the witness in preparation for court later. The leads gained are likely to be more accurate immediately after an incident.

Chain of custody

The chain of custody practice ensures that you know, and can account for, exactly what happened to a sample from the time an enforcement officer took it from its original site until the time an expert (or the court) can assess it.

The practice avoids the risk that evidence could be changed, whether deliberately or mistakenly (eg, by cross-contamination of samples), to bear more weight against the defendant than merited. For this reason, an identifiable person must always have the physical custody of a piece of evidence, and record the history of what the evidence was exposed to and which might affect its evidential characteristics (eg, utensils, gloves, or containers).

The chain of custody is particularly important when a number of people are involved in handling the sample. This could include a company contracted to take the sample, and a laboratory to analyse it. When the sample is not with you, you must be able to account for its location (eg, "I placed the sample in a chilly bin in the local authority vehicle and I locked the vehicle").

In practice, the chain of custody means the following:

- The officer will take charge of a piece of evidence, document its collection, and hand it over to a person/system for secure storage.
- Every transaction between the collection of the evidence and its appearance in court should be documented chronologically in order.
- Documentation should include the conditions under which the evidence is gathered, the identity of all evidence handlers, duration of evidence custody, security conditions while handling or storing the evidence, and the manner in which evidence is transferred (see RMA Enforcement Manual Forms and Checklists - Chain of custody (PDF, 14 KB)).

Examples of measures taken to secure the chain of custody include:

- another person to assist with collection, storage, and delivery (to corroborate your account)
- photographs of samples collected to corroborate your account (although scenes could be falsely duplicated)
- fresh gloves, containers or bags for each sample; well-sealed containers; and clean equipment used for taking samples, to avoid cross-contamination
- storing samples to avoid degradation from light
- labelling and recording samples before moving between sites (or to other spaces within sites when location may be a significant factor in proving the offence), to avoid any possibility of confusion as to where the samples came from
- using a seal on the container large enough for a signature, and name, and incorporating a tape that cannot be removed without trace (sealing tape identified clearly as the property of the local authority is more suitable than blank tape)

- securing samples in locked areas with controlled access at all times (including agreed secure procedures with any laboratory)
- securing all courier receipts, or receipts from the laboratory (PDF, 16 KB) , as evidence of the chain of custody (lost receipts can only be compensated for by the records of courier companies; these take time to retrieve).

Four relevant cases relating to the taking of samples and the chain of custody are

- ***Northland Regional Council v Northland Port Corporation (NZ) Ltd and others [1996] CRN 5088011428-447, 527-528, 532-533***
- ***Northland Regional Council v Juken Nissho Ltd [1998] CRN 7029003709, 7029003874 and 7029004299***
- ***Wellington Regional Council v 0 'Rourke and Cremen [1993] CRN 3035007074-76***
- ***Canterbury Regional Council v Pacific Marine Limited [2001] (RN0009026633)***

Note taking

Notes from inspections and interviews (whether formal, on-site or on the phone) are essential for the following reasons:

- The notes will form the basis for briefs of evidence (yours, and other witnesses ') that will be prepared for any hearing or affidavits for matters dealt with ex parte (applicant alone, no other parties) or on the papers.
- The notes can be referred to by the note-taker when giving evidence about things observed or admissions heard, to refresh his or her memory in a prosecution, so long as the note was taken at the time of the incident or admission, or as soon as possible thereafter.
- Local authorities have six months after an incident to lay charges but it may take another 6 to 12 months to obtain a hearing date. Notes are necessary to remember the details of what happened, once the matter is in court.

Refreshing memory from notes

The elements of an offence are sometimes multiple and technical, involving such things as dimensions, gradients, materials, or species. They sometimes also capture a concept where there is room for personal interpretation, like what is 'offensive ' or 'obstructive '. The details are very important, and 6-12 months after the event when you are in a court room being cross-examined, there is a good chance you will not be able to clearly recall all of them.

Fortunately, the law allows witnesses to refresh their memory from written documents, with the prior leave of the judge and after the documents have been shown to all the other parties: s90(4),(5) of the EA. The document must have been made or adopted at a time when the witness's memory was fresh. There are no hard and fast rules on how soon after an inspection the documents must be made. What is acceptable depends on the circumstances: making a note a few hours after a site visit may usually be acceptable, but in some cases this could result in concerns about reliability. For example if other similar sites were visited or other detailed inquiries undertaken in the intervening

time between an inspection and preparing the written record, there could be mistakes made.

If notes are rewritten or typed, always keep or scan the original hand-written notes. These notes are the contemporaneous record that you will rely on in court to refresh your memory.

Taking photographs

A photograph can depict facts important to determining whether an offence has occurred, such as the damage done by the offence occurring. Photos are advantageous because they:

- often provide evidence that is hard to dispute: "a picture is worth a thousand words"
- are not subject to changed meanings each time they are challenged
- are less likely to miss important details (or lose supporting information) than may occur in note-taking
- can depict a crime scene in an easily absorbed way, helping the court to understand the facts of the case
- can provide good evidence as to the scale of the offence - showing the risk, damage or other issue which the legislation seeks to address. These matters, if not directly elements of the offence, will usually be visually inseparable from admissible evidence. They will assist the court by illuminating the sentencing submissions made later.

The key benefits of photographs should guide the investigator in taking them:

- Facts in issue: know the elements of your offence, and if the opportunity exists, ensure you have photographs of places and things that depict those elements. For example: if the offence is the removal of protected vegetation of specified species and size within a riparian margin, take photographs close enough to assist in identification of species, others that depict the size of felled trees or of the remaining stumps by way of a measuring stick or tape, and also show the location of removed trees in relation to the waterway.
- Depiction of crime scene: overview photographs will help establish the scene in the court’s mind. Ensure they include parts of the scene that depict where the evidence lies, so you can then 'zoom in' with detail shots later. Consider the angles that photographs can be taken from to best show what happened, or the circumstances of the incident.
- Significance of an offence: camera angles, close-ups and other ways of capturing details of the offending may assist. Also comparative photographs may help if they exist, for example showing a site where damage occurred before and after the offending.
- Take photographs that will help you remember your experience of the scene. In court, they will refresh your memory and help you deal with questions.

Photographs are powerful, but without some explanation their value is limited. They are best produced at court with an explanation both of what is in them and of the circumstances in which they were taken. It is a good idea to record this information in a notebook at the time; the date and location of the evidence found and photographed may be critical.

It is better to take too many photographs than too few. It may not be possible to go back later and take more photographs if the scene has changed and evidence has been removed.

Section 332 of the RMA does not specifically allow enforcement officers to take photographs, although in most cases the owner or occupier does not object to photographs being taken. In Waitakere City Council v Gordon [1999] MA 99/99, the District Court Judge commented that a warrant under s334 of the RMA would always be a wise precaution. Compare this to An Application by Waikato Regional Council v Wellington [2002] A226/02, where the Environment Court Judge considered the Waitakere case and stated that photographs are an aid for recalling what the officer has seen and are part and parcel of recording an inspection.

Interviews and Statements

Purpose

Generally interviews are designed to record what witnesses to an offence observed, not what they thought about it. Nevertheless, the witnesses ' opinions and intuition can provide enforcement officers with leads that can be tested through asking further questions about why the witnesses think what they do.

The main focus, while ensuring some basic freedom in the interview, is to assist interviewees to tell their story - all that they can recollect, in a way that is most productive. This could mean that an interview on-site is best, or with photographs of the incident, or in a quiet space away from their usual distractions.

Interviews may produce different kinds of results:

- If interviewing a witness, you may obtain original evidence of material facts (facts that satisfy an element of the offence).
- If interviewing a suspect, you may obtain an admission as well as an explanation with possible defences, and evidence of motive or negligence as aggravating factors on sentence.
- In any interview you may obtain a lead, especially through hearsay.
- Interviewees ' behaviour and consistency in what they say can give you clues about the veracity of their statements.

Approach

Remember, an interviewee is not on trial, and care needs to be taken to avoid the line of questioning becoming aggressive. There is nothing wrong with trying to strike up a rapport; engage with the person first about things particular to their experience that you share some knowledge or interest in, before inviting the answers to questions. Enforcement officers are more likely to get witnesses or suspects thinking carefully about what they observed if they are happy to be part of an investigation.

Nothing can replace practice when interviewing. A good way to practice in a safe setting is to question your colleagues on a story they know but you don't. It is also a good idea to sit in on interviews and observe experienced officers in action.

It is recommended that enforcement officers follow a consistent format and structure when carrying out interviews. This will help you get the most out of your time with an interviewee, and keep things on track if the interviewee is difficult or distracted. It will also enable lessons (positive and negative) obtained from previous interviews to be incorporated into future interviews.

Planning the interview

It is good practice for enforcement officers to:

- consider what would be an appropriate location for the interview:
    - Witnesses are often best interviewed on their 'own turf ' where they feel most comfortable recalling details.
    - Suspects can be interviewed at local authority offices (as practicable), where enforcement officers may be more comfortable dealing with uncooperative behaviours.
- write down a few key questions that can act as prompts. This enables you to probe some areas in more detail without losing track of the overall line of inquiry
- frame questions giving consideration to the elements of the offence. Start by establishing the identity and role of the witness in relation to the incident; this assists in keeping the interview relevant
- use open questions during the interview, starting with "who, what, when, why, where, how?" rather than closed questions that invite only a yes/no response (eg, "did you see a man with a black moustache …?") Witnesses should be allowed to tell their story, in their own words. Open questions can also elicit details and uncover potential new evidence or lines of inquiry that may not otherwise have been considered
- assist the story telling by trying questions that prompt the interviewee's recollection of events in sequence, for example "when did you first notice…? what happened after that?… what has changed recently?"
- consider questions for the end of your interview that explore your theory of the case. Be sure not to let this direct the interview too early, or close your mind to what the witness is telling you
- have a plan for dealing with uncooperative behaviours (such as a reluctance to answer questions, lies, hostility, or a threat to walk out)
- take notes as the interview proceeds. Those notes will allow the officer to build a witness statement at the end of the interview. Any admissions should be checked and recorded in full.

Conducting the interview

A framework for conducting interviews follows the acronym PEACE:

- ***P***lanning and preparation
- ***E***ngage and explain
- ***A***ccount, clarification and challenge
- ***C***losure
- ***E***valuation.

Planning and preparation: Ensure that you find a space for your interview that permits minimal distractions, especially for potentially difficult interviews with suspects.

Engage and explain: This involves assessing the personality of an interviewee at the beginning of an interview, adapting your style to fit the style and personality of the interviewee so that you can get the most out of them. It also involves establishing the ground rules for the interview: explaining what it is for and how it will proceed; try to get buy-in from the interviewee about that.

Account, clarification and challenge: This involves the central purpose of an interview: obtaining a person's account of what happened. You should take care to clarify what someone says, when statements are vague or ambiguous. You should also be ready to challenge an account when you know the information given is false. Your challenge should be adapted to the person (i.e. to what is more likely to work with the particular interviewee).

Closure: Check that you have covered all the basics (the "who, where, what, why, when and how" of the events witnessed). Your understanding of the key points of the account should be summarised and checked back with the interviewee to ensure accuracy. Query, ask for clarification on, or otherwise consider anything you still don't understand, which remains vague, or which is subject to a discrepancy with other evidence you have collected; consider how to obtain further information from the interviewee that might assist.

Evaluation: Finally, assess what the enforcement officer has learnt on two fronts:

1. What has been discovered in relation to the investigation and what other enquiries should now be pursued as a result of the interview?
2. What can be done to improve the interviewing technique and confidence? Assessment from peers may assist here.

Statement taking

The importance of recorded statements

It is good practice to summarise a person's account or statement about key events. The record is important for a number of reasons:

1. Information discovered to date can be traced and it becomes easier to determine where to take the investigation next.
2. Statements are useful for briefing witnesses if they are to appear in court later; their earlier statements can be used as a starting point.
3. Witnesses can use statements to remind themselves in court if they were made at a time when the events recorded in it were fresh in their memory ('refreshing memory rule ' in s90(4),(5) of the EA)
4. A statement may still be admissible as evidence even when the witness has forgotten some of what was said, provided that the information is useful and reliable for the court (exception to previous consistent statements rule s35(3) of the EA)
5. If a witness makes mistakes in court, the prosecutor can correct them by offering a previous statement in relation to the facts of the case (s37(4)(b) of the EA)
6. If a prosecution witness actually becomes hostile, the prosecutor can (with the judge’s leave) cross-examine the witness using previous statement to show inconsistency: (s37(4)(a) of the EA). In this way, the prosecutor may limit damage done to the case by casting doubt on the witness's disposition to tell the truth.
7. A statement can be used in court to back up what a witness has said, if the defence challenges the ability to provide an accurate and truthful account due to a previous but recent inconsistent statement or claim (s35(2) of the EA).
8. A statement might be admitted if the statement-maker is unavailable as a witness, so long as the circumstances provide reasonable assurance that it is reliable (exception to the hearsay rule s18(1) of the EA).

Note that the general rule is that, the statement is inadmissible if it is consistent with what the witness will say in court. The purpose of the rule is to focus the fact-finding on evidence given by a witness in court: evidence of statements made consistently outside of court generally add nothing to a case; and evidence is best tested in court through cross-examination of a witness. However, there are exceptions, as explained below.

If the statement-maker is a defendant, recording the statement may be important because:

- The statement might be admitted against the defendant as evidence of facts in issue, including to prove his or her identity as the offender.
- The defendant may offer evidence in favour of their own veracity or against one of your witnesses. If the statement you have from the defendant runs contrary to that evidence, a judge may allow it in response (s38(2) of the EA).

Given how useful a recorded statement can be, it is important to make sure that the method of taking it and the circumstances in which it is taken do not prevent its admission into evidence at court.

Statements with no signature or that are changed

If the statement-maker refuses to sign a statement, as a suspect may, the enforcement officer should still date and sign the record of what was said and make precise notes of the circumstances and refusal. The lack of endorsement may not necessarily invalidate the statement as the court will weigh the lack of endorsement against other factors.

Statement-makers wanting to correct what has been recorded should write in the correction themselves and sign it on the same page. By reference to their handwriting and signature, any later allegation that you made an alteration without their approval can be resisted.

Hearsay

Sometimes a potential witness, or an enforcement officer, may not have observed what occurred first hand, but have been told about it by another person who did so. This type of evidence is called hearsay, and it is normally inadmissible in court unless the other person is also a witness.

There are some other exceptions. One key exception is that evidence offered by the prosecution of a statement made by a defendant is admissible and the rules of hearsay, opinion and previous consistent statements do not apply (s27 of the EA). Note however, that the statement may be still be excluded for other reasons including reliability, oppression, and improperly obtained evidence (ss28-30 of the EA).

Freedom to leave

Section 22 of the New Zealand Bill of Rights Act prohibits arbitrary arrest or detention. There is no specific power under the RMA to detain a person for questioning; therefore the interviewer must avoid giving the impression that the interviewee is not free to refuse to answer questions or to depart at any time. The test is whether the interviewee reasonably formed the perception that he or she was not free to go. An obvious example would be directing an interviewee during a meeting to 'stay put '.

Under s22 of the RMA, the only information the person interviewed is required to give an enforcement officer on request is:

- if he or she is a natural person, their full name, address and date of birth.
- if not, its full name and address only.

The officer can also direct a person to give the following information about another person on whose behalf they are breaching or have breached any obligations under part 3 of the Act:

- if the other person is a natural person, their full name, address and date of birth
- if not, its full name and address only.

Cautioning a potential defendant

There is a divergence of practice in New Zealand about formally cautioning defendants for local government offences. A caution involves telling potential defendants that they do not have to say anything but what they do say may be taken down and used as evidence against them in criminal proceedings.

Cautioning first became standard (police) practice in England after 1912 as a result of the 'Judges' Rules' - guidelines that judges would follow in using their discretion to exclude evidence and ensure a fair trial. The rules were formulated to deal with concerns about police conduct in detaining and questioning suspects, and in particular the divergence in practice between different police forces. High Court Judge Lawrence J explained in R. v Voisin [1918] 1 KB 531, that:

In 1912 the judges, at the request of the Home Secretary, drew up some rules as guidance for police officers. These rules have not the force of law; they are administrative directions the observance of which the police authorities should enforce upon their subordinates as tending to the fair administration of justice. It is important that they should do so, for statements obtained from prisoners, contrary to the spirit of these rules, may be rejected as evidence by the judge presiding at the trial.

Strictly speaking, the Judges' Rules have only ever applied to police interviews. However, a similar requirement is imposed under section 23(4) of the New Zealand Bill of Rights Act, which provides that:

Everyone who is—
(a) Arrested; or
(b) Detained under any enactment—

for any offence or suspected offence shall have the right to refrain from making any statement and to be informed of that right.

Under the RMA, there is no right of arrest or detention, so s23(4) of the New Zealand Bill of Rights Act does not apply.

The law in this area may develop further. Today, the Judges' Rules are relevant to a judge's discretion to exclude 'improperly obtained' evidence for unfairness (s30 of the EA (EA)) and to the exclusion of defendant statements made in circumstances that affected their reliability (s28 of the EA).

While the Judges' Rules apply only to the police, the obligation to be fair applies to all investigations. Being fair in asking a suspect questions might mean disclosing that you have information suggesting an offence has been committed, and that you are obliged to investigate and make a decision about how to proceed under the RMA. As explained above, an interviewer must also avoid giving the impression that the interviewee is not free to refuse to answer questions or to depart at any time.

Any future developments in this area are likely to reflect the fundamental reforming principle of the EA, which is to facilitate the admission of any evidence that will assist the court in determining proceedings.

Reliability of statements

In Court the defendant (on an evidential foundation) or judge may question whether the circumstances in which a statement was made adversely affected its reliability (refer s28 of the EA). In such cases, the judge must always be satisfied that reliability was not affected, or the statement will be excluded. Relevant circumstances include:

- any pertinent physical, mental, or psychological condition of the defendant when the statement was made (whether apparent or not)
- any pertinent characteristics of the defendant including any mental, intellectual, or physical disability to which the defendant is subject (whether apparent or not)
- the nature of any questions put to the defendant and the manner and circumstances in which they were put
- the nature of any threat, promise, or representation made to the defendant or any other person.

The defendant (on an evidential foundation) or judge may also raise the issue of the statement being influenced by oppression (refer s29 of the EA).

If the issue of oppression is raised, the prosecution is obliged to show beyond reasonable doubt that that statement was not influenced by oppression - or the statement will be excluded.

The guidelines in s29 partly overlap with the general obligation to conduct an investigation fairly, and with the requirements about excluding of improperly obtained evidence under s30 of the EA. Taken together these requirements mean it is important to:

- avoid leading the defendant's answers
- avoid making any promises or threats that may affect what the defendant says
- be alert to the mental state of the defendant, including whether the defendant is distressed or under influence of alcohol or drugs.

If an enforcement officer thinks a suspect perceives a threat or inducement to answer questions, it should be reiterated that he or she is free to refuse to answer questions and to leave at any time.

The issue with threats and inducements is whether the behaviour of the investigating officer(s) led to admissions that would not have been made otherwise.

Expert Opinion on the Evidence Collected

Enforcement officers will sometimes need to seek the opinions of experts or suitably qualified professionals to establish whether an element of an offence has been met. This could happen when the evidence is of a particularly technical nature, requires legal interpretation, or requires the input of someone with extensive experience of a matter that is difficult to objectively measure.

On other occasions, witnesses may be keen to make comments about the matter under investigation, offering their opinion on particular facts when making a statement.

Generally, a Court will not admit opinion evidence unless it is from an expert on the facts involved and will offer substantial assistance to the fact-finder judge or jury (refer s23-25 of the EA which relates to statement of opinion and expert evidence). The opinion rule is important to consider when:

- finding appropriate witnesses for the case
- preparing briefs of evidence from statements given by witnesses.

Note however that s24 of the EA provides that a witness may state an opinion in evidence if that opinion is necessary to enable him or her to communicate, or the fact-finder to understand, what the witness saw, heard, or otherwise perceived.

Veracity and propensity evidence

During the course of an investigation, the enforcement officer may well find out information about activities, relationships and other dealings of a suspect that indicate they are not truthful (veracity) and /or that they are likely to have committed the alleged offence (propensity).

These are matters of character. Evidence about them is strictly controlled by the Courts, because they may prejudice the fact finder (especially a jury) even if they are not directly relevant to the case.

Veracity evidence is not admissible unless it is substantially helpful in assessing a person's truthfulness. Relevant examples under s37(3) of the EA include:

- the person's disposition to tell the truth when under a legal obligation to do so (for example, in an earlier proceeding or in a signed declaration)
- previous convictions for offences of dishonesty
- previous inconsistent statements
- bias
- a motive to be untruthful.

The prosecution may not offer veracity evidence about the defendant unless the judge gives leave and the defendant first raises veracity, either by giving such evidence about him or herself or by challenging the veracity of a prosecution witness by reference to a matter other than facts in issue.

Propensity evidence is typically encountered when enforcement officers check records to see whether a suspect has been the subject of previous investigations.

The prosecution may only offer propensity evidence about a defendant in accordance with s43 of the EA. The judge has discretion to allow propensity evidence by balancing its value as evidence against the risk of an unfair prejudicial effect. For example, previous convictions for similar offences are typically very prejudicial.

Whether the effect of allowing propensity evidence is unfair depends on:

- the extent of any similarity between the offending acts or omissions
- the extent to which the acts are unusual (i.e., no ordinary person would do this repeatedly)
- the level of repetition, and the lapse of time between offences.

If offering evidence of previous convictions, the prosecution must first inform the judge as to the purpose of doing so.

The Investigation File

The investigation file contains all relevant information concerning the current investigation. Where relevant and available, this file should include:

- a copy of the enforcement officer's Warrant of Authority
- The enforcement officer's inspection notes (in date order) including job sheets, incident reports, notebook entries (i.e. notebook itself)
- complaints in whatever form received by council, such as notes of telephone calls and letters
- council forms, file notes or records of telephone conversation(s)
- other contemporaneous records (note that where this includes information recorded on a dictaphone tape, the tape itself should be retained as it is the tape that is the contemporaneous record)
- photographs (labelled and dated) along with the diagram showing where the photographs were taken
- measurements i.e. survey notes, diagrams
- evidence specimens (bagged if necessary and dated) and notations in evidence register
- letters to complainants, potential defendants and others (this should include any warning letters issued)
- letters from complainants, potential defendants and others
- statements from potential witnesses
- interview notes, and transcripts of interviews and statements (which must be checked to ensure accuracy against hand-written or taped record)
- maps
- e-mails, or copies of any relevant documents stored electronically
- copies of any search warrant issued for the investigation
- any other supporting information available.

It helps to group this information in sections, then arrange it chronologically within each section. For example:

- offence / offender (identity, admissions, offence provisions, legal opinions, fact analysis)
- scene (site maps, zoning maps, other locality and land features information and field notes)
- witnesses (personal details and statements)
- exhibits (photographs, chain of custody and analysis of samples)
- administration (phone and correspondence, notices and investigation reports / decision forms).

To assist your thinking on the case, you might add an overview section to the file including:

- information on suspects' identities - title (owner), company search (directors' names), as well as leases, easements and licenses (ability to use property)
- copies of relevant sections of legislation, regulations and local laws (plans/bylaws), highlighted to show the alleged offence and any potential defences
- elements of the offence (Fact analysis)
- list of potential witnesses

- list of potential exhibits (and corresponding name of the witness who would produce the item)
- chronology of events
- date by which charges must be laid (usually six months after the incident occurred).

The investigation file would be used as the base from which to compile a prosecution file for hearing, which would include:

- copies of relevant sections of legislation, rules, abatements notices, conditions (and so on) identifying the alleged offence and any potential defences
- fact analysis
- informant's copy of the 'informations' (charges)
- summary of facts
- witness schedule
- briefs of evidence for all witnesses (supported by copy of original statement)
- exhibits schedule (with corresponding name of the witness who is to produce the item of document/evidence)
- copies of exhibits to be produced
- victim impact statement (for sentencing).

Some additional relevant rules of evidence

The best evidence rule

The best evidence rule is a reminder to preserve original documents for production in court. The rule is part of the common law but it remains applicable to the extent that it is consistent with the provisions, and promotion of the purpose and principles, of the EA (refer sections 10 and 12). This means that it should be approached as a guideline rather than a strict requirement, since the overriding objective is ensuring that all relevant and reliable evidence is admitted.

Where copies of original documents are involved, reliability is the main test of admissability: in other words, where a copy is reliable, it is likely to be admitted. Manual copying should be supported by evidence of the copying process to establish reliability. An automatic copying device or technical process will not require proof that a copy is accurate, if it ordinarily does what is asserted (refer s137 of the EA). The defence may, however, raise evidence of inaccuracy or intervention in the process (e.g., that digital photographs were copied and modified).

Note that photographs may be enhanced or otherwise modified and remain admissible, if the purpose of that enhancement is fair and relevant and can be clearly understood by the Court. For this reason the original should always be kept to allow your purpose to be tested.

Disclosure of information

A prosecutor has a duty to disclose to the defendant any file notes and other documents relating to the prosecution. Communications between the local authority and its lawyer are excepted, as these are protected by solicitor-client privilege. Sections 51 to 67 of the EA contain further information about privilege.

The duty of the prosecution to disclose information to the defence was established by the provisions of the Official Information Act 1982 the decisions in Commissioner of Police v Ombudsman [1988] 1 NZLR 385(also reported as Pearce v Thompson [1988] 3 CRNZ 268) effectively places an obligation on the prosecution to supply to the defendant copies of briefs of evidence, witnesses' statements and interview notes on request. Such information is 'personal information' under the Act, and the defendant has a statutory right to request it.

If the local authority takes enforcement action other than prosecution, the party against whom the action is taken can make a request under the Local Government Official Information and Meetings Act 1987. Copies of documents on the local authority file will then have to be provided, unless there are reasons for withholding the information under sections 6 and 7 of the Local Government Official Information and Meetings Act.

Publishing enforcement action

Prejudice to the defendant

Defendants prosecuted under the RMA for offences against s338(1) have a right to elect trial by jury. A company prosecuted under the RMA has a right to elect trial by jury even though the company itself cannot be sentenced to imprisonment. If a local authority prosecutes and there is a media report about the prosecution, this could influence the jury and prejudice the right of the defendant to a fair trial. It may take some time for the defendant to make a decision as to whether or not to elect trial by jury.

- Local authorities should not issue press releases on prosecutions other than with very general details of the case, and without identification of the defendants.

Subjudice

Generally public comment is not made about a case when it is still before the Courts and the determination of guilt or innocence is yet to be made. The media do, however, report about matters before the Court makes a decision but need to comply with the Environment Court Media Coverage Guidelines 2011.

- In press releases about any enforcement matters before a Court decision, it should be clear the local authority is taking enforcement action in respect of an alleged breach of the RMA. For a case law example, see Manawatu-Wanganui Regional Council v Lakeview Farm Fresh Ltd [2000] CRN 9031005197-205.

Good practice examples

Scenarios

Scenario 1: Dumping of sandblasting material

Harry and two other enforcement officers respond to an urgent complaint of dumping of spent sandblasting sand at an unauthorised dump site. When Harry and colleagues arrive at the site they find a man standing next to a truck whose trailer contains a large quantity of sand with traces of paint flakes.

A stream at the site is a tributary to a waterway that has been identified in the regional plan as significant. All three enforcement officers introduce themselves to the man at the site and produce their warrants. Harry uses a trowel to collect sand from the trailer of the truck. He then uses the same trowel to collect samples from a pile of sand which is near the truck but does not clean the trowel between collecting the various samples. Harry sends the samples to an external laboratory and asks the laboratory to complete a chain of custody form.

Harry suspects that the sand is from a local sandblasting firm and pays a visit. The firm refuses to give Harry information.

A month after the incident Harry is notified by the laboratory there was a slip-up and the chain of custody form was not completed.

Q1: Does the council have sufficient evidence to prosecute?

A1: The council should only prosecute if it can obtain further evidence. At this stage the evidence is substandard. To prosecute, the council has to prove breach of s15(1)(b) and/or s15(1)(d) of the RMA. The standard of proof must be beyond reasonable doubt. There is a possibility of cross-contamination of the samples and the chain of custody form has not been completed.

Scenario 2: Illegal vegetation removal

The council receives complaints that a large area of native vegetation is being felled illegally. Harry investigates together with another enforcement officer and speaks to the property owner and the contractor who has just finished work for the day.

Harry estimates that an area of about 1 hectare has been cleared. A resource consent has not been granted although this is required under the District Plan. Harry and colleague show their warrants to the property owner, Mr Smith, and to the contractor. Harry takes a number of photographs.

Harry asks Mr Smith to stop cutting down the vegetation. Harry explains that Smith is in breach of the District Plan and is therefore in breach of the RMA.

Some of the vegetation has fallen into a nearby stream and Harry expresses his concern to Smith that this vegetation may block the stream and cause flooding to the upstream property. Harry also talks to the contractor and gives him the same information. He also explains that, even though the contractor is acting under instructions from Smith, the contractor is in contravention of the RMA and the council can take enforcement steps against him, including prosecution.

The contractor tells Harry he has another job arranged for the next week but intends to return to Smith's property and continue to fell vegetation in the week thereafter. Smith tells Harry he intends to continue clearing the vegetation and that Harry has no right to tell him what to do on his own property. Smith picks up a chainsaw and waves this menacingly at the other enforcement officer.

Q1: What is the appropriate action to take?

A1: Harry and the other enforcement officer should immediately leave the property. They may be in danger. Harry should arrange for an application for an interim enforcement order to be filed, supported by an affidavit from himself and his colleague.

The photographs taken should be annexed as exhibits. Harry should explain in the affidavit that Smith and the contractor refused to cooperate, that clearing of this vegetation is in breach of district plan and that no resource consent has been issued. The council can prosecute.

Fact analysis

Level of inquiry	Example elements	Relevant facts (+ evidence for any inferred facts)
What is the offence?	s338(1)(a) of the RMA: Breach of **s9** of the RMA: using land in a manner that contravenes **a rule in a District Plan** without resource consent or existing use rights: **Rule 5C.7.3.3C** Specific Tree Protection	
What are the legal elements?	1. A person who contravenes or permits a contravention of section 9: land used in a manner that contravenes a rule in a District Plan - 5C.7.3.3C Specific Tree Protection:	
	a. felling, trimming, damaging or removal of kauri	
	b. at no. 4A Grove Street, Ngahere	
	c. Lot 76, DP 555123	
	d. where each truck with a circumference of 250 mm or more	
	e. taken at 1.4m above ground	
	2. Date	
	3. Are any defences applicable?	
Who is the offender?		

Scenario 3: Objectionable odour

The council receives numerous complaints about odour from a pig farm. The farm is about 30 kilometres from the Council's main office and surrounded by 15 lifestyle blocks.

Ten of the 15 neighbours are complaining. Three of them do not complain, and these neighbours work at the farm which is the largest pig farm in New Zealand. It started in the 1970s with about 300 pigs, but now has about 5000 pigs.

Harry and other council enforcement officers investigate and find that many of the complaints are justified.

The odour conditions in the existing resource consent are:

- The consent holder shall operate and manage all piggery waste, and waste treatment systems, such that there are no objectionable odour beyond the property boundary, which cause an objectionable or offensive effect.
- For the purpose of condition 12 of this resource consent, the council will consider an effect that is objectionable or offensive to have occurred if any enforcement officer of the council deems it so after having regard to the frequency, intensity and duration; and having consulted with the consent holder or a trained operator on-site; and having regard to any actions taken by the consent holder to avoid, remedy or mitigate the perceived adverse effect of the odour.

Q1: What is the most appropriate enforcement mechanism?

A1: Further investigation has to be carried out before deciding on an enforcement mechanism. Council staff should meet with the complainants and find out if they agree to the council informing the pig farmer of the names of the complainants. It should be pointed out that if the complainants want to remain anonymous, the council will have difficulty taking enforcement action. Council staff should then speak to the pig farmer and inform him about the complaints.

Q2: What evidence should be collected?

A2: Evidence should be carefully collected. Any other possible sources of odour should be excluded (conduct a 360-degree check around the pig farm). All complaints should be recorded and a strategy put in place to respond to complaints. Draft a scale for assessing the odour. The scale should incorporate factors in the consent conditions (eg, frequency, intensity and duration). A scale of 1-5 is easier to work with than one of 1-10.

Search warrants

How do I draft a search warrant application?

There are no specific forms in the RMA for search warrants. The form contained in s198 of the Summary Proceedings Act 1957 can be used as a guide. See an example warrant application (PDF, 43 KB) drafted for a district plan matter.

In making the application and showing reasonable grounds for belief, inferences are often important. You usually build those inferences by laying out a chronology of the investigation, with details of relevant findings at different points in the investigation.

Be aware of the fact that a search warrant is to cover an intrusion on privacy. It is a mechanism to provide scrutiny of your powers and investigative purpose, and balance these against individual freedom. You should include anything prejudicial to the search, such as the fact you are relying on leads provided by a neighbour who is in dispute with your suspect. Including the material is important because your suspect is not present during the application to challenge it. A registrar or judge's scrutiny now may save a finding of unreasonable search later.

More good practice tips about search warrants

The first time a local authority seeks to obtain a search warrant under the RMA, it will be important to discuss the RMA and s334 with the District Court registrar. It is a good idea to:

- call ahead and ask for half an hour to go through it; the registrar may choose to find a judge in chambers to consider it on these first occasions
- create a good first impression; have an experienced criminal prosecutor check your first few warrants.

On-site, it is effective to have:

- a constable experienced in the serving of warrants to make the initial entry ahead of you and to secure cooperation; after that you should take the lead
- have a plan and roles assigned for evidence collection: a coordinator, searchers, an interviewer to take occupants through any questions you have or that might arise from articles found, and a manager of exhibits.

Relevant case law

For a list of relevant case refer to the Enforcement Manual case law summaries.